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No. 91-1603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SAVE BARTON CREEK ASSOCIATION, INC.,
WE CARE AUSTIN, INC., and AUSTIN CROSSROADS, INC.,
Petitioners,

v.

FEDERAL HIGHWAY ADMINISTRATION, TEXAS STATE
DEPARTMENT OF TRANSPORTATION, and
MOPAC SOUTH TRANSPORTATION CORPORATION,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF OF RESPONDENT MOPAC SOUTH TRANSPORTATION CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether two state roadways, which are being constructed entirely with state funds and without any federal supervision, authorization, commitment, or control, are subject to federal environmental review under the National Environmental Policy Act.

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STATEMENT

Petitioners seek to enjoin the construction of two Texas state roadways, designated MoPac South and Segment 3, on the theory that the construction constitutes a "major Federal action" under section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), and thus cannot be undertaken until an environmental impact statement has been prepared. It is undisputed that the planning and construction of the

two roadways were undertaken "by state authorities without substantive federal supervision, authorization, commitment, or control, and will never be subject to review or approval by a federal agency." Pet. App. 32. The district court nonetheless reasoned that because these state funded roadways will connect with existing and proposed federally funded roadways, the state roadways should be treated as integral parts of a "major Federal action."

The Fifth Circuit reversed, explaining that the district court's "ruling when placed in its context would mean that every time a state or local government desires to build a non-federal aid highway project . . . that connects to existing federal highways . . . , the project would be subject to NEPA because it would be 'dependent' on the federal facilities." Pet. App. 28. As the court of appeals noted, its own earlier decisions, as well as those of other circuits, reject such an expansive application of NEPA. *Id.* at 28-29.

The Fifth Circuit also rejected the district court's view that preliminary contacts between the state and the Federal Highway Administration ("FHWA") concerning the two roadways were sufficient as a matter of law to trigger NEPA's requirements. The court of appeals noted that those contacts had been made merely to preserve the option of federal funding—an option the state subsequently chose not to exercise—and it is well established that "the possibility of federal funding in the future for a project or group of projects does not make that project or projects 'major Federal action' during the planning stage." Pet. App. 13, quoting *Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1347 (5th Cir. 1979).

In short, the Fifth Circuit recognized that this is a case in which "[t]he state is simply building some highways for its own use," Pet. App. 13, "and concluded that the

use of state funds would enable it to proceed without the delays and expenses associated with compliance with federal environmental law." *Id.* at 32. Because the federal government possesses "no control, right to control, or even the prerogative to suggest compliance with federal standards," *id.*, the court of appeals held that the two roadways "are state projects not subject to the requirements of NEPA." *Id.* at 33.

ARGUMENT

The decision below represents a routine application of the well-established rule that states are entitled to build their own roads with their own funds without having to submit to federal environmental review under NEPA. That decision unquestionably is correct, and there is no conflict among the circuits or any other reason why this Court should undertake plenary review.

Indeed, petitioners do not even challenge the Fifth Circuit's holding on the central legal issue of how NEPA should be construed and applied. They seek review because the court of appeals allegedly "usurped the fact-finding role our system rightly assigns to the trial court and . . . failed to exercise the primary responsibility of appellate courts: the enunciation or clarification of legal doctrine." Pet. 5. These case-specific quibbles, even if arguably justified, would not satisfy the standards for certiorari. *See* Sup.Ct.R. 10.1. But petitioners' complaints are not justified. The Fifth Circuit properly respected the trial court's role as finder of fact, and it adequately and fully explained its legal reasoning.

I. THE FIFTH CIRCUIT DID NOT USURP THE DISTRICT COURT'S ROLE AS FINDER OF FACT

Petitioners' allegation that the Fifth Circuit disregarded the standard of review prescribed by F.R.Civ.P. 52(a), and thus "usurped the fact-finding role," rests on a fundamental misreading of the nature of the issue decided by the district court. When the district court

held the two state roadways to be integral parts of a proposed "major Federal action," the court was not making a finding of fact that could be reversed only if clearly erroneous. That holding was, instead, a legal conclusion that the district court reached by applying the regulatory terms "proposal" and "integral parts" to essentially uncontested facts. The Fifth Circuit was entitled to review that legal conclusion and to reverse for legal error. That is all it did.

The environmental review requirements of section 102(2)(C) of NEPA apply only to "*proposals* for . . . major Federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added). The Counsel on Environmental Quality ("CEQ") has described a "proposal" as "that stage in the development of an action when [a federal] agency subject to [NEPA] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23 (1991). FHWA further has determined that "[i]f an action in question is an *integral part* of a larger project which is the subject of an [NEPA] environmental document, that action cannot be 'segmented' from the overall *proposal* and funded separately before the environmental process is completed." 52 Fed. Reg. 32,649 (1987) (emphasis added).

The issue before the lower courts was whether, within the meaning of NEPA and CEQ's and FHWA's rules, there had been a "proposal" for a "major Federal action" of which MoPac South and Segment 3 were "integral parts." In deciding this issue, the Fifth Circuit did not challenge or disagree with the trial court's factual findings, only with the legal conclusions the trial court based upon those findings. As the Fifth Circuit explained, "[t]he district court's ruling that NEPA applies to MoPac South and Segment 3 stems from an *erroneous legal conclusion* that the Austin Outer Loop constitutes

a 'proposal for major Federal action' subject [to] an environmental document." Pet. App. 9 (emphasis added); *see also* Pet. App. 20 ("the error of the district court lies in concluding that these two highway projects are an integral part of an Austin Outer Loop").

In short, the district court had misunderstood the proper scope and application of the pertinent statutory and regulatory terms, and the Fifth Circuit corrected that misunderstanding. Nowhere in its opinion did the Fifth Circuit overstep the bounds of proper appellate review. "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984).

Where, as here, the issue is whether or how a statutory or regulatory term applies to largely uncontested facts, the issue properly is treated as one of law. For example, when a tax statute permits the deduction of "ordinary and necessary" expenses, the "[d]etermination of whether the . . . expenses are 'ordinary and necessary' requires conclusions from undisputed facts . . . [and] [t]he clearly erroneous standard does not apply." *Colorado Springs National Bank v. United States*, 505 F.2d 1185, 1189 (10th Cir. 1974). *See also, e.g., Wirtz v. Barnes Grocer Co.*, 398 F.2d 718, 722 (8th Cir. 1968) (applying the term "enterprise"). This case is the same. What constitutes a "proposal" or an "integral part" within the meaning of CEQ's and FHWA's regulations is importantly a question of law rather than of fact. And where, as here, "the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n. 15 (1982); *see also, Bose Corp.*, 466 U.S. at 501 n.17; *Pullman-Standard v. Swint*, 456 U.S. 273

(1982); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n. 9 (1963).

II. THE COURT OF APPEALS CLEARLY ENUNCIATED ITS CONCLUSIONS OF LAW

The Fifth Circuit explained its legal conclusions in an unusually lengthy and carefully written opinion. Petitioners' complaints on that score are frivolous.

In the section of its opinion captioned "Major Federal Action," Pet. App. 9-21, the Fifth Circuit began with the legal principle that "the touchstone of 'major Federal action' constitutes a federal agency's authority to influence nonfederal activity." *Id.* at 11. The court then reviewed the undisputed record evidence and found no evidence of such federal authority in this case. *Id.* at 12-14. The court next analyzed the legal requirements for a "proposal," relying on the CEQ's construction of that term. *Id.* at 14 n.9 (citing 40 C.F.R. § 1508.23 (1991)). After explaining that "the district court incorrectly elevated FHWA's early coordination process to the status of 'proposal' under NEPA," *id.* at 15, the court concluded that "[s]ince the FHWA has at this time given no approvals —whether it be approval of a final EIS, approval of design, approval of location, or approval of funding—there has been no 'major Federal action' in connection with any segment of the Austin Outer Loop. The 'federal imprimatur' that sometimes attaches to state projects is simply not present in this case." *Id.* at 18. In support of this conclusion, the court supplied extensive citation to and analysis of other legal precedents, all of which were consistent with its ruling. *Id.* at 18-21.

Similarly, in the section of its opinion captioned "Segmentation," Pet. App. 21-32, the court reviewed the extensive body of case law addressing the meaning of the term "integral part" and then concisely summarized the applicable doctrine which it had first announced over ten years ago:

> "Segmentation" or "piecemealing" is an attempt by an agency to divide artificially a "major Federal action" into smaller components to escape the application of NEPA to some of its segments. This claim is a major part of the charge made by plaintiffs in this case. "As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements." *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. Unit B 1981). Segmentation becomes suspect, however, only after an evaluation of such factors as whether the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.

Id. at 23-24. The legal criteria stated by the court are exactly those promulgated by FHWA. *See* 23 C.F.R. § 771.111(f) (1991).

The Fifth Circuit then examined those four "integral part" criteria in detail for Segment 3 and MoPac South based on the undisputed record evidence, Pet. App. 25-32, and summarized its conclusion thusly:

> We have addressed the central question in the challenge of improper segmentation—whether Segment 3 and MoPac South serve significant purposes and have the requisite independent utility. The record clearly indicates that the two projects serve such purposes and are sufficiently independent even in the absence of MoPac, U.S. 290, and the Austin Outer Loop. This Court finds that both Segment 3 and MoPac South would meet the elements enumerated in *Piedmont Heights* to fall outside of NEPA's purview.

Id. at 30. That conclusion was both clear and correct.

Petitioners' professed inability to glean legal doctrine from the Fifth Circuit's opinion results not from any lack of enunciation or clarity by the court but rather

from petitioners' stubborn refusal to accept NEPA for what it is—a statute with clearly-defined limits. The plain fact is that "[a]lthough desperate environmental plaintiffs have attempted to convert NEPA into a national land use statute, Congress did not intend section 102(2)(C) to apply to actions undertaken by state, local, or private concerns without any federal participation or approval." Pet. App. 20 (*quoting* McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 Tex. L. Rev. 801, 837 (1977)). The Fifth Circuit did no more than recognize and apply that home truth, and its decision does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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